



U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 2150
Falls Church, Virginia 22041

April 18, 2019

Matthew Hoppock
MuckRock News
DEPT MR 62275
411A Highland Ave
Somerville, MA 02144-2516

Re: FOIA 2019-2075

Dear Mr. Hoppock,

This letter is in response to your Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) in which you seek e-mails regarding *Lorenzo v. Sessions*.

Responsive documents are enclosed. Portions of the enclosed documents have been redacted in accordance with 5 U. S.C. § 552(b)(6) to avoid a clearly unwarranted invasion of personal privacy, and/or 5 U. S.C. § 552(b)(5) to protect privileged information. The reason for redaction is clearly marked on each redacted portion. There will be no charge for the enclosed documents.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. *See* <http://www.justice.gov/oip/foiapost/2012foiapost9.html>.

You may contact our FOIA Public Liaison at the telephone number 703-605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://www.foiaonline.gov/foiaonline/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

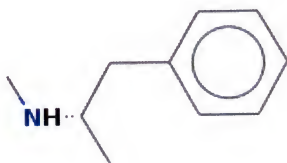
Sincerely,

Joseph Schaaf

Joseph R. Schaaf
Senior Counsel for Administrative Law

From: [Hartman, Jeffrey \(EOIR\)](#)
To: [Chun, Jennifer \(EOIR\)](#); [All IJs - Ninth Circuit \(EOIR\)](#); [All JLCs - Ninth Circuit \(EOIR\)](#)
Cc: [Lin, Austin \(EOIR\)](#)
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions -- Chemistry Cliff Notes Edition
Date: Thursday, August 30, 2018 12:00:15 PM
Attachments: [image001.png](#)

All that you ever wanted to know about [methamphetamine](#), and then some.



The Tenth and Third Circuits find that methamphetamine has two optical, [enantiomer](#) isomers—i.e., methamphetamine does not have the geometric isomers the Ninth Circuit alludes to. The cases below may be helpful as isomer-related controlled substance issues arise. There are also a lot of other similar cases related to other controlled substances that arose in the 1980s and early 1990s.

See [United States v. Decker](#), 55 F.3d 1509, 1512 (10th Cir. 1995).

“On this record, the district court correctly understood that the methamphetamine molecule exists in different isomeric forms (d-methamphetamine being the “right-handed” isomer of its “left-handed” mirror image, l-methamphetamine) and that d,l-methamphetamine is a single substance composed of exactly 50% of each of the two isomers.”

[United States v. Bogusz](#), 43 F.3d 82, 89 (3d Cir. 1994).

The methamphetamine molecule, like most organic molecules, exists in different “isomeric” forms. Isomers “are compounds that have the same molecular formula but different structural formulas.” Harold Hart, *Organic Chemistry: A Short Course* 15 (6th ed. 1983) (“Organic Chemistry Text”). Just as people are either right- or left-hand dominant, a molecule can sometimes exist in right- and left-handed forms. See *Organic Chemistry Text* at 125–26; Roger A. Hegstrom & Dilip K. Kondepudi, *The Handedness of the Universe*, *Scientific American*, Jan. 1990, at 108 (“Hegstrom & Kondepudi Article”); [United States v. Patrick](#), 983 F.2d 206, 209 (11th Cir.1993). A molecule “that exhibits the property of handedness” is called a chiral molecule.⁷ The two forms of the chiral molecules are called enantiomers.⁸

Each **enantiomer** is labelled either Dextro or Levo, or D or L. Hegstrom & Kondepudi Article at 109. The difference is determined by the **optical rotation of light**. D is right- *89 handed and L is left-handed. One is the mirror image of the other; that is, they are mirror symmetrical. *Id.* Although enantiomers only differ with respect to chirality, the human body "is highly sensitive to enantiomeric differences." *Id.* For example, the thalidomide birth defects of the 1960's resulted because one enantiomer of thalidomide stopped morning sickness while the other caused birth defects. *Id.* at 109–10.⁹

Methamphetamine exists in these two isomeric forms.¹⁰ L-methamphetamine is a compound that produces little or no physiological effect when ingested. Carroll, 6 F.3d at 743. D-methamphetamine, on the other hand, produces the physiological effect desired by its users. *Id.*

An "enantiomer" is where a pair of stereo isomers are non-superimposable mirror images of each other.

Relevant thoughts from the Maryland Court of Special Appeals on the isomer defense, *Best v. State*, 76 Md. App. 241, 277–78 (Md. Ct. Spec. App. 1989):

We believe that the First Circuit in this case was on the right track but that its reasoning needs at least some elaboration. The sum total of all of the responses to the cocaine isomer defense is that it is an exercise in futility, frequently working much mischief, to require the State, in a vacuum, to negate theoretical defenses that have not been shown to be anything more than textbook or chemistry laboratory possibilities. This is the classic and most efficacious *278 function of a Thayer-Wigmore "bursting bubble" presumption.

When all of our experience shows that the cocaine recovered from drug traffickers is the natural derivative of the coca leaf, there arises a Thayer-Wigmore presumption that any substance shown by normal testing to be cocaine is that natural derivative. The burden of production is cast upon the party raising the remote and exotic possibility to generate a genuine jury issue in that regard. If and when that is done, the presumption is dissipated-the bubble bursts-and the burden is rightfully cast upon the prosecution to negate such a possibility.

That this doctrinal approach is constitutional is clear. Mullaney v. Wilbur.

421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Evans v. State*, 28 Md.App. 640, 349 A.2d 300 (1975), *aff'd*, *State v. Evans*, 278 Md. 197, 362 A.2d 629 (1976). Although a burden of ultimate persuasion may never be cast upon a defendant in a criminal case, the burden of production is frequently upon a defendant to generate a genuine jury issue (such as mitigation in a homicide case or self-defense) before the burden shifts to the State to negate that defense by persuasion beyond a reasonable doubt.

We hold, furthermore, that to generate a genuine jury issue in this regard does not mean simply raising the theoretical possibility of such a substance. It requires some evidence that the nontraditional isomer is actually present in a given case.

Hopefully someone out there is a Chemist.

All the best,
Jeff

From: Chun, Jennifer (EOIR)
Sent: Wednesday, August 29, 2018 2:48 PM
To: All IJs - Ninth Circuit (EOIR) <AllIJs-NinthCircuit@EOIR.USDOJ.GOV>; All JLCs - Ninth Circuit (EOIR) <AllJLCs-NinthCircuit@EOIR.USDOJ.GOV>
Cc: Lin, Austin (EOIR) <Austin.Lin@EOIR.USDOJ.GOV>
Subject: Ninth Circuit published: *Atenia Lorenzo v. Sessions*

Atenia Lorenzo v. Sessions, No. 15-70814, --- F.3d ---, 2018 WL 4100360 (9th Cir. Aug. 29, 2018).

ISSUES: Categorical Approach, Modified Categorical Approach, Controlled Substance

HOLDINGS: If a statute contains two layers of disjunctive lists, the categorical analysis is applied to both layers of the statute. Under this approach, California's definition of methamphetamine in California Health & Safety Code ("CHSC") § 11055—which is an element applicable to a conviction under CHSC §§ 11378 and 11379(a)—is not a categorical match to the federal definition. As it is stated in CHSC §§ 11378 and

11379(a), the element is also indivisible, and therefore the modified categorical approach does not apply.

PRACTICAL EFFECT: A conviction of CHSC §§ 11378 or 11379(a) does not qualify as a controlled substance offense as defined in INA § 237(a)(2)(B) (i). It remains to be seen, however, if such conviction also does not qualify as an illicit trafficking offense as defined in INA § 101(a)(43)(B).

In 2013, the petitioner was convicted of violating CHSC § 11378, possessing methamphetamine, and violating CHSC § 11379(a), transporting methamphetamine. Both statutes designate methamphetamine as a controlled substance by pointing to a specific provision in CHSC § 11055, which identifies a list of Schedule II substances:

CHSC § 11378	CHSC § 11379(a)	CHSC § 11055(d)(2)
“possess[] for sale a controlled substance that . . . is specified in subdivision (d), (e), or (f) . . . of Section 11055.”	“transport[] . . . any controlled substance which is . . . specified in subdivision (d) or (e) . . . of Section 11055.”	“[m]ethamphetamine, its salts, isomers, and salts of its isomers”

CHSC § 11033 further provides that the term “isomer,” unless otherwise defined, “includes optical and geometrical . . . isomers.”

In applying the first step of the categorical approach in this case, the panel had to examine a disjunctive list—CHSC § 11055(d)(2), which identifies several types of methamphetamine—within another disjunctive list—CHSC § 11055, which identifies several types of controlled substances. It was therefore not enough to conclude, as the Ninth Circuit had in *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), that California’s disjunctive list of controlled substances is overbroad but divisible. Rather, in this instance, another categorical analysis—addressing whether California’s disjunctive list of types of methamphetamine is overbroad and, if so, divisible—was also required.

Under this approach, the panel held California’s definition of methamphetamine is broader than the federal definition because California’s definition includes both geometric and optical isomers of methamphetamine,

while the Controlled Substance Act (“CSA”) includes only optical isomers. Accordingly, California’s definition of methamphetamine is not a categorical match to the federal definition under the first step of categorical approach.

Next, the panel held the overbroad element of methamphetamine in CHSC §§ 11378 and 11379(a) is also indivisible. Under California law, geometric and optical isomers of methamphetamine are alternative means of committing a single offense, not alternative elements of committing several offenses.

Because the California statute is overbroad and indivisible with respect to the overbroad element, the modified categorical approach cannot be applied to determine whether the petitioner’s convictions involved a type of methamphetamine covered by the CSA. As a result, his convictions under CHSC §§ 11378 and 11379(a) do not qualify as controlled substance offenses that render him removable under INA § 237(a)(2)(B)(i).

Because the IJ and BIA did not address whether the petitioner was removable on the ground that his CHSC § 11379(a) conviction constitutes an illicit trafficking aggravated felony as defined in INA § 101(a)(43)(B), the panel did not address that question. However, the panel noted that, if the BIA addresses the government’s aggravated felony theory on remand, it should consider whether that theory suffers from the same flaw as the government’s theory of removability under INA § 237(a)(2)(B)(i).

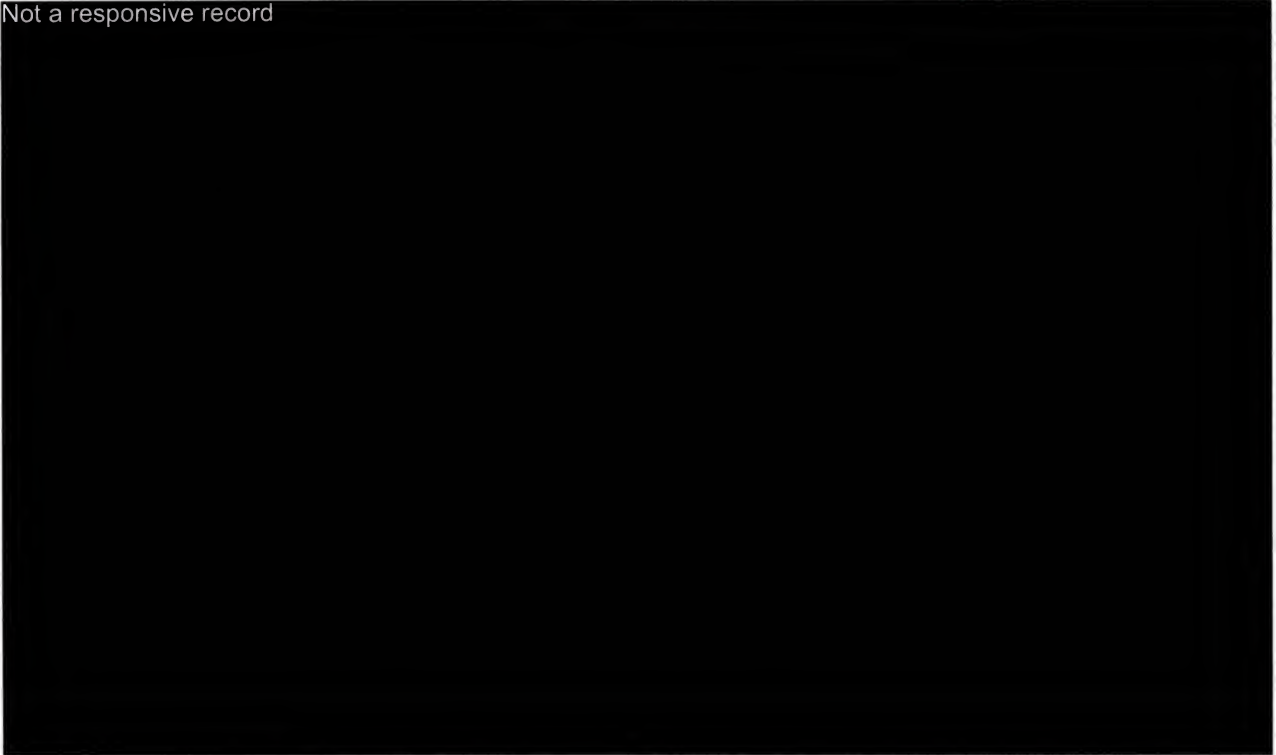
Jenn Chun

Attorney Advisor

San Francisco Immigration Court, 4F

(b) (6)

Not a responsive record



From: Globerson, Justin (EOIR)
Sent: Wednesday, August 29, 2018 4:32 PM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

Great work on this. Super interesting!

From: Globerson, Justin (EOIR)
Sent: Wednesday, August 29, 2018 4:34 PM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

Layers on layers on layers

From: Burch, Valerie A. (EOIR)
Sent: Wednesday, August 29, 2018 5:33 PM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>
Subject: FW: Ninth Circuit published: Atenia Lorenzo v. Sessions

Jenn

Interpreting the reach of this case would make a great brown bag. Just glancing at it, I think that the impact will be monumental. I think that CHSC 11377 uses the same definition of meth and will be affected as well. So too may the inadmissibility grounds relating to drug offenses. Meth is, by far,

the most common drug for which people are convicted of CHSC offenses...

Do you know who is planning the next brown bag?

Thank you,
Val

Valerie A. Burch | Immigration Judge

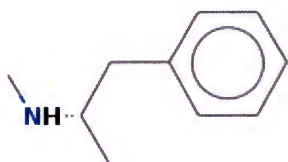
Immigration Court | San Francisco, CA
T: (b) (6) | Valerie.A.Burch@usdoj.gov

From: Burch, Valerie A. (EOIR)
Sent: Thursday, August 30, 2018 8:46 AM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

Cool! Thank you!

From: Hartman, Jeffrey (EOIR)
Sent: Thursday, August 30, 2018 9:00 AM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>; All IJs - Ninth Circuit (EOIR) <AllIJs-NinthCircuit@EOIR.USDOJ.GOV>; All JLCs - Ninth Circuit (EOIR) <AllJLCs-NinthCircuit@EOIR.USDOJ.GOV>
Cc: Lin, Austin (EOIR) <Austin.Lin@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions -- Chemistry Cliff Notes Edition

All that you ever wanted to know about [methamphetamine](#), and then some.



The Tenth and Third Circuits find that methamphetamine has two optical, [enantiomer](#) isomers—i.e., methamphetamine does not have the geometric isomers the Ninth Circuit alludes to. The cases below may be helpful as isomer-related controlled substance issues arise. There are also a lot of other similar cases related to other controlled substances that arose in the 1980s and early 1990s.

See [United States v. Decker](#), 55 F.3d 1509, 1512 (10th Cir. 1995).

“On this record, the district court correctly understood that the methamphetamine molecule exists in different isomeric forms (d-methamphetamine being the “right-handed” isomer of its “left-

handed" mirror image, l-methamphetamine) and that d,l-methamphetamine is a single substance composed of exactly 50% of each of the two isomers."

United States v. Bogusz, 43 F.3d 82, 89 (3d Cir. 1994).

The methamphetamine molecule, like most organic molecules, exists in different "isomeric" forms. Isomers "are compounds that have the same molecular formula but different structural formulas." Harold Hart, *Organic Chemistry: A Short Course* 15 (6th ed. 1983) ("Organic Chemistry Text"). Just as people are either right- or left-hand dominant, a molecule can sometimes exist in right- and left-handed forms. See *Organic Chemistry Text* at 125–26; Roger A. Hegstrom & Dilip K. Kondepudi, *The Handedness of the Universe*, *Scientific American*, Jan. 1990, at 108 ("Hegstrom & Kondepudi Article"); United States v. Patrick, 983 F.2d 206, 209 (11th Cir.1993). A molecule "that exhibits the property of handedness" is called a chiral molecule.⁷ The two forms of the chiral molecules are called enantiomers.⁸

Each enantiomer is labelled either Dextro or Levo, or D or L. Hegstrom & Kondepudi Article at 109. The difference is determined by the optical rotation of light. D is right-handed and L is left-handed. One is the mirror image of the other; that is, they are mirror symmetrical. *Id.* Although enantiomers only differ with respect to chirality, the human body "is highly sensitive to enantiomeric differences." *Id.* For example, the thalidomide birth defects of the 1960's resulted because one enantiomer of thalidomide stopped morning sickness while the other caused birth defects. *Id.* at 109–10.⁹

Methamphetamine exists in these two isomeric forms.¹⁰ L-methamphetamine is a compound that produces little or no physiological effect when ingested. Carroll, 6 F.3d at 743. D-methamphetamine, on the other hand, produces the physiological effect desired by its users. *Id.*

An "enantiomer" is where a pair of stereo isomers are non-superimposable mirror images of each other.

Relevant thoughts from the Maryland Court of Special Appeals on the isomer defense, *Best v. State*, 76 Md. App. 241, 277–78 (Md. Ct. Spec. App. 1989):

We believe that the First Circuit in this case was on the right track but that its reasoning needs at least some elaboration. The sum total of all of the responses to the cocaine isomer defense is that it is an exercise in futility, frequently working much mischief, to require the State, in a vacuum, to negate theoretical defenses that have not been shown to be anything more than textbook or chemistry laboratory possibilities. This is the classic and most efficacious *278 function of a Thayer-Wigmore "bursting bubble" presumption.

When all of our experience shows that the cocaine recovered from drug traffickers is the natural derivative of the coca leaf, there arises a Thayer-Wigmore presumption that any substance shown by normal testing to be cocaine is that natural derivative. The burden of production is cast upon the party raising the remote and exotic possibility to generate a genuine jury issue in that regard. If and when that is done, the presumption is dissipated-the bubble bursts-and the burden is rightfully cast upon the prosecution to negate such a possibility.

That this doctrinal approach is constitutional is clear. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); Evans v. State, 28 Md.App. 640, 349 A.2d 300 (1975), *aff'd*, State v. Evans, 278 Md. 197, 362 A.2d 629 (1976). Although a burden of ultimate persuasion may never be cast upon a defendant in a criminal case, the burden of production is frequently upon a defendant to generate a genuine jury issue (such as mitigation in a homicide case or self-defense) before the burden shifts to the State to negate that defense by persuasion beyond a reasonable doubt.

We hold, furthermore, that to generate a genuine jury issue in this regard does not mean simply raising the theoretical possibility of such a substance. It requires some evidence that the nontraditional isomer is actually present in a given case.

Hopefully someone out there is a Chemist.

All the best,
Jeff

From: Lakhani, Sarah (EOIR)

Sent: Thursday, August 30, 2018 9:27 AM

To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>

Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

Thank you!

From: Deiss, Ila C. (EOIR)

Sent: Thursday, October 11, 2018 11:57 AM

To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>

Cc: Hartman, Jeffrey (EOIR) <Jeffrey.Hartman@EOIR.USDOJ.GOV>; Globerson, Justin (EOIR) <Justin.Globerson@EOIR.USDOJ.GOV>

Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

Hi there,

Do you know if a conviction for meth possession would render someone inadmissible under 212(a)(2)(A)(i)(II)? DHS orally moved to pretermitt adjustment of status application. ICD

Ila C. Deiss
United States Immigration Judge
100 Montgomery St., Ctrm 9
San Francisco, CA 94104

(b) (5)

From: Hartman, Jeffrey (EOIR)

Sent: Thursday, October 11, 2018 2:21 PM

To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>

Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

I didn't realize it was a reply all thing. Here was my reply—seems like we're on the same page.

(b) (5)

Hope all is well!

Jeff

not a responsive record

From: [Ruane, Rachel Ann \(EOIR\)](#)
To: [Hartman, Jeffrey \(EOIR\)](#)
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions -- Chemistry Cliff Notes Edition
Date: Friday, August 31, 2018 3:34:34 PM
Attachments: [image001.png](#)

This is really interesting given what the IJ found – that there was no such thing as a geometric isomer. But the 9th dismisses that statement in one sentence and does not really state why that is an untrue sentence.

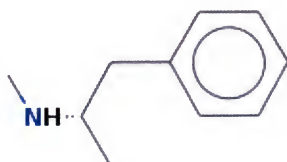
Rachel Ann Ruane | Immigration Judge

Immigration Court, 15th Floor | 606 S. Olive St. | Los Angeles, CA 90014

T: (b) (6) | Rachel.Ann.Ruane@usdoj.gov

From: Hartman, Jeffrey (EOIR)
Sent: Thursday, August 30, 2018 9:00 AM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>; All IJs - Ninth Circuit (EOIR) <AllIJs-NinthCircuit@EOIR.USDOJ.GOV>; All JLCs - Ninth Circuit (EOIR) <AllJLCs-NinthCircuit@EOIR.USDOJ.GOV>
Cc: Lin, Austin (EOIR) <Austin.Lin@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions -- Chemistry Cliff Notes Edition

All that you ever wanted to know about [methamphetamine](#), and then some.



The Tenth and Third Circuits find that methamphetamine has two optical, [enantiomer](#) isomers—i.e., methamphetamine does not have the geometric isomers the Ninth Circuit alludes to. The cases below may be helpful as isomer-related controlled substance issues arise. There are also a lot of other similar cases related to other controlled substances that arose in the 1980s and early 1990s.

See [United States v. Decker](#), 55 F.3d 1509, 1512 (10th Cir. 1995).

“On this record, the district court correctly understood that the methamphetamine molecule exists in different isomeric forms (d-methamphetamine being the “right-handed” isomer of its “left-handed” mirror image, l-methamphetamine) and that d,l-methamphetamine is a single substance composed of exactly 50% of each of the two isomers.”

[United States v. Bogusz](#), 43 F.3d 82, 89 (3d Cir. 1994).

The methamphetamine molecule, like most organic molecules, exists in different “isomeric” forms. Isomers “are compounds that have the same molecular formula but different structural formulas.” Harold Hart, *Organic Chemistry: A Short Course* 15 (6th ed. 1983) (“Organic Chemistry Text”). Just as people are either right- or left-hand dominant, a molecule can sometimes exist in right- and left-handed forms. See *Organic Chemistry Text* at 125–26; Roger A. Hegstrom & Dilip K. Kondepudi, *The Handedness of the Universe*, *Scientific American*, Jan. 1990, at 108 (“Hegstrom & Kondepudi Article”); *United States v. Patrick*, 983 F.2d 206, 209 (11th Cir.1993). A molecule “that exhibits the property of handedness” is called a chiral molecule.⁷ The two forms of the chiral molecules are called enantiomers.⁸

Each **enantiomer** is labelled either Dextro or Levo, or D or L. Hegstrom & Kondepudi Article at 109. The difference is determined by the **optical rotation of light**. D is right- *89 handed and L is left-handed. One is the mirror image of the other; that is, they are mirror symmetrical. *Id.* Although enantiomers only differ with respect to chirality, the human body “is highly sensitive to enantiomeric differences.” *Id.* For example, the thalidomide birth defects of the 1960's resulted because one enantiomer of thalidomide stopped morning sickness while the other caused birth defects. *Id.* at 109–10.⁹

Methamphetamine exists in these two isomeric forms.¹⁰ L-methamphetamine is a compound that produces little or no physiological effect when ingested. *Carroll*, 6 F.3d at 743. D-methamphetamine, on the other hand, produces the physiological effect desired by its users. *Id.*

An “enantiomer” is where a pair of stereo isomers are non-superimposable mirror images of each other.

Relevant thoughts from the Maryland Court of Special Appeals on the isomer defense, *Best v. State*, 76 Md. App. 241, 277–78 (Md. Ct. Spec. App. 1989):

We believe that the First Circuit in this case was on the right track but that its reasoning needs at least some elaboration. The sum total of all of the responses to the cocaine isomer defense is that it is an exercise in futility, frequently working much mischief, to require the State, in a vacuum, to

negate theoretical defenses that have not been shown to be anything more than textbook or chemistry laboratory possibilities. This is the classic and most efficacious *278 function of a Thayer-Wigmore "bursting bubble" presumption.

When all of our experience shows that the cocaine recovered from drug traffickers is the natural derivative of the coca leaf, there arises a Thayer-Wigmore presumption that any substance shown by normal testing to be cocaine is that natural derivative. The burden of production is cast upon the party raising the remote and exotic possibility to generate a genuine jury issue in that regard. If and when that is done, the presumption is dissipated-the bubble bursts-and the burden is rightfully cast upon the prosecution to negate such a possibility.

That this doctrinal approach is constitutional is clear. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); Evans v. State, 28 Md.App. 640, 349 A.2d 300 (1975), *aff'd*, State v. Evans, 278 Md. 197, 362 A.2d 629 (1976). Although a burden of ultimate persuasion may never be cast upon a defendant in a criminal case, the burden of production is frequently upon a defendant to generate a genuine jury issue (such as mitigation in a homicide case or self-defense) before the burden shifts to the State to negate that defense by persuasion beyond a reasonable doubt.

We hold, furthermore, that to generate a genuine jury issue in this regard does not mean simply raising the theoretical possibility of such a substance. It requires some evidence that the nontraditional isomer is actually present in a given case.

Hopefully someone out there is a Chemist.

All the best,
Jeff

From: Chun, Jennifer (EOIR)

Sent: Wednesday, August 29, 2018 2:48 PM

To: All IJs - Ninth Circuit (EOIR) <AllIJs-NinthCircuit@EOIR.USDOJ.GOV>; All JLCs - Ninth Circuit (EOIR) <AllJLCs-NinthCircuit@EOIR.USDOJ.GOV>

Cc: Lin, Austin (EOIR) <Austin.Lin@EOIR.USDOJ.GOV>

Subject: Ninth Circuit published: *Atenia Lorenzo v. Sessions*

Atenia Lorenzo v. Sessions, No. 15-70814, --- F.3d ---, 2018 WL 4100360 (9th Cir. Aug. 29, 2018).

ISSUES: Categorical Approach, Modified Categorical Approach, Controlled Substance

HOLDINGS: If a statute contains two layers of disjunctive lists, the categorical analysis is applied to both layers of the statute. Under this approach, California’s definition of methamphetamine in California Health & Safety Code (“CHSC”) § 11055—which is an element applicable to a conviction under CHSC §§ 11378 and 11379(a)—is not a categorical match to the federal definition. As it is stated in CHSC §§ 11378 and 11379(a), the element is also indivisible, and therefore the modified categorical approach does not apply.

PRACTICAL EFFECT: A conviction of CHSC §§ 11378 or 11379(a) does not qualify as a controlled substance offense as defined in INA § 237(a)(2)(B)(i). It remains to be seen, however, if such conviction also does not qualify as an illicit trafficking offense as defined in INA § 101(a)(43)(B).

In 2013, the petitioner was convicted of violating CHSC § 11378, possessing methamphetamine, and violating CHSC § 11379(a), transporting methamphetamine. Both statutes designate methamphetamine as a controlled substance by pointing to a specific provision in CHSC § 11055, which identifies a list of Schedule II substances:

CHSC § 11378	CHSC § 11379(a)	CHSC § 11055(d)(2)
“possess[] for sale a controlled substance that . . . is specified in subdivision (d), (e), or (f) . . . of Section 11055.”	“transport[] . . . any controlled substance which is . . . specified in subdivision (d) or (e) . . . of Section 11055.”	“[m]ethamphetamine, its salts, isomers, and salts of its isomers”

CHSC § 11033 further provides that the term “isomer,” unless otherwise defined, “includes optical and geometrical . . . isomers.”

In applying the first step of the categorical approach in this case, the panel had to examine a disjunctive list—CHSC § 11055(d)(2), which identifies several types of methamphetamine—within another disjunctive list—CHSC § 11055, which identifies several types of controlled substances. It was therefore not enough to conclude, as the Ninth Circuit had in *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), that California’s disjunctive list of controlled substances is overbroad but divisible. Rather, in this instance, another categorical analysis—addressing whether California’s disjunctive list of types of methamphetamine is overbroad and, if so, divisible—was also required.

Under this approach, the panel held California’s definition of methamphetamine is broader than the federal definition because California’s definition includes both geometric and optical isomers of methamphetamine, while the Controlled Substance Act (“CSA”) includes only optical isomers. Accordingly, California’s definition of methamphetamine is not a categorical match to the federal definition under the first step of categorical approach.

Next, the panel held the overbroad element of methamphetamine in CHSC §§ 11378 and 11379(a) is also indivisible. Under California law, geometric and optical isomers of methamphetamine are alternative means of committing a single offense, not alternative elements of committing several offenses.

Because the California statute is overbroad and indivisible with respect to the overbroad element, the modified categorical approach cannot be applied to determine whether the petitioner’s convictions involved a type of methamphetamine covered by the CSA. As a result, his convictions under CHSC §§ 11378 and 11379(a) do not qualify as controlled substance offenses that render him removable under INA § 237(a)(2)(B)(i).

Because the IJ and BIA did not address whether the petitioner was removable on the ground that his CHSC § 11379(a) conviction constitutes an illicit trafficking aggravated felony as defined in INA § 101(a)(43)(B), the panel did not address that question. However, the panel noted that, if the BIA addresses the government’s aggravated felony theory on remand, it should consider whether that theory suffers from the same flaw as the government’s theory of removability under INA § 237(a)(2)(B)(i).

Jenn Chun

Attorney Advisor

San Francisco Immigration Court, 4F

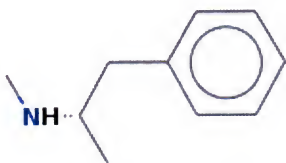
(b) (6)

From: [Odell, John \(EOIR\)](#)
To: [Hartman, Jeffrey \(EOIR\)](#)
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions -- Chemistry Cliff Notes Edition
Date: Thursday, August 30, 2018 5:56:27 PM
Attachments: [image001.png](#)

(b) (5)

From: Hartman, Jeffrey (EOIR)
Sent: Thursday, August 30, 2018 9:00 AM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>; All IJs - Ninth Circuit (EOIR) <AllIJs-NinthCircuit@EOIR.USDOJ.GOV>; All JLCs - Ninth Circuit (EOIR) <AllJLCs-NinthCircuit@EOIR.USDOJ.GOV>
Cc: Lin, Austin (EOIR) <Austin.Lin@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions -- Chemistry Cliff Notes Edition

All that you ever wanted to know about [methamphetamine](#), and then some.



The Tenth and Third Circuits find that methamphetamine has two optical, [enantiomer](#) isomers—i.e., methamphetamine does not have the geometric isomers the Ninth Circuit alludes to. The cases below may be helpful as isomer-related controlled substance issues arise. There are also a lot of other similar cases related to other controlled substances that arose in the 1980s and early 1990s.

See [United States v. Decker](#), 55 F.3d 1509, 1512 (10th Cir. 1995).

“On this record, the district court correctly understood that the methamphetamine molecule exists in different isomeric forms (d-methamphetamine being the “right-handed” isomer of its “left-handed” mirror image, l-methamphetamine) and that d,l-methamphetamine is a single substance composed of exactly 50% of each of the two isomers.”

[United States v. Bogusz](#), 43 F.3d 82, 89 (3d Cir. 1994).

The methamphetamine molecule, like most organic molecules, exists in different “isomeric” forms. Isomers “are compounds that have the same molecular formula but different structural formulas.” Harold Hart, *Organic Chemistry: A Short Course* 15 (6th ed. 1983) (“Organic Chemistry Text”).

Just as people are either right- or left-hand dominant, a molecule can sometimes exist in right- and left-handed forms. See Organic Chemistry Text at 125–26; Roger A. Hegstrom & Dilip K. Kondepudi, *The Handedness of the Universe*, Scientific American, Jan. 1990, at 108 (“Hegstrom & Kondepudi Article”); United States v. Patrick, 983 F.2d 206, 209 (11th Cir.1993). A molecule “that exhibits the property of handedness” is called a chiral molecule.⁷ The two forms of the chiral molecules are called enantiomers.⁸

Each enantiomer is labelled either Dextro or Levo, or D or L. Hegstrom & Kondepudi Article at 109. The difference is determined by the optical rotation of light. D is right- *89 handed and L is left-handed. One is the mirror image of the other; that is, they are mirror symmetrical. *Id.* Although enantiomers only differ with respect to chirality, the human body “is highly sensitive to enantiomeric differences.” *Id.* For example, the thalidomide birth defects of the 1960's resulted because one enantiomer of thalidomide stopped morning sickness while the other caused birth defects. *Id.* at 109–10.⁹

Methamphetamine exists in these two isomeric forms.¹⁰ L-methamphetamine is a compound that produces little or no physiological effect when ingested. Carroll, 6 F.3d at 743. D-methamphetamine, on the other hand, produces the physiological effect desired by its users. *Id.*

An “enantiomer” is where a pair of stereo isomers are non-superimposable mirror images of each other.

Relevant thoughts from the Maryland Court of Special Appeals on the isomer defense, *Best v. State*, 76 Md. App. 241, 277–78 (Md. Ct. Spec. App. 1989):

We believe that the First Circuit in this case was on the right track but that its reasoning needs at least some elaboration. The sum total of all of the responses to the cocaine isomer defense is that it is an exercise in futility, frequently working much mischief, to require the State, in a vacuum, to negate theoretical defenses that have not been shown to be anything more than textbook or chemistry laboratory possibilities. This is the classic and most efficacious *278 function of a Thayer-Wigmore “bursting bubble” presumption.

When all of our experience shows that the cocaine recovered from drug traffickers is the natural derivative of the coca leaf, there arises a Thayer-Wigmore presumption that any substance shown by normal testing to be cocaine is that natural derivative. The burden of production is cast upon the party raising the remote and exotic possibility to generate a genuine jury issue in that regard. If and when that is done, the presumption is dissipated-the bubble bursts-and the burden is rightfully cast upon the prosecution to negate such a possibility.

That this doctrinal approach is constitutional is clear. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); Evans v. State, 28 Md.App. 640, 349 A.2d 300 (1975), *aff'd*, State v. Evans, 278 Md. 197, 362 A.2d 629 (1976). Although a burden of ultimate persuasion may never be cast upon a defendant in a criminal case, the burden of production is frequently upon a defendant to generate a genuine jury issue (such as mitigation in a homicide case or self-defense) before the burden shifts to the State to negate that defense by persuasion beyond a reasonable doubt.

We hold, furthermore, that to generate a genuine jury issue in this regard does not mean simply raising the theoretical possibility of such a substance. It requires some evidence that the nontraditional isomer is actually present in a given case.

Hopefully someone out there is a Chemist.

All the best,
Jeff

From: Chun, Jennifer (EOIR)
Sent: Wednesday, August 29, 2018 2:48 PM
To: All IJs - Ninth Circuit (EOIR) <AllIJs-NinthCircuit@EOIR.USDOJ.GOV>; All JLCs - Ninth Circuit (EOIR) <AllJLCs-NinthCircuit@EOIR.USDOJ.GOV>
Cc: Lin, Austin (EOIR) <Austin.Lin@EOIR.USDOJ.GOV>
Subject: Ninth Circuit published: Atenia Lorenzo v. Sessions

Atenia Lorenzo v. Sessions, No. 15-70814, --- F.3d ---, 2018 WL 4100360 (9th Cir. Aug. 29, 2018).

ISSUES: Categorical Approach, Modified Categorical Approach, Controlled Substance

HOLDINGS: If a statute contains two layers of disjunctive lists, the categorical analysis is applied to both layers of the statute. Under this approach, California’s definition of methamphetamine in California Health & Safety Code (“CHSC”) § 11055—which is an element applicable to a conviction under CHSC §§ 11378 and 11379(a)—is not a categorical match to the federal definition. As it is stated in CHSC §§ 11378 and 11379(a), the element is also indivisible, and therefore the modified categorical approach does not apply.

PRACTICAL EFFECT: A conviction of CHSC §§ 11378 or 11379(a) does not qualify as a controlled substance offense as defined in INA § 237(a)(2)(B) (i). It remains to be seen, however, if such conviction also does not qualify as an illicit trafficking offense as defined in INA § 101(a)(43)(B).

In 2013, the petitioner was convicted of violating CHSC § 11378, possessing methamphetamine, and violating CHSC § 11379(a), transporting methamphetamine. Both statutes designate methamphetamine as a controlled substance by pointing to a specific provision in CHSC § 11055, which identifies a list of Schedule II substances:

CHSC § 11378	CHSC § 11379(a)	CHSC § 11055(d)(2)
“possess[] for sale a controlled substance that . . . is specified in subdivision (d), (e), or (f) . . . of Section 11055.”	“transport[] . . . any controlled substance which is . . . specified in subdivision (d) or (e) . . . of Section 11055.”	“[m]ethamphetamine, its salts, isomers, and salts of its isomers”

CHSC § 11033 further provides that the term “isomer,” unless otherwise defined, “includes optical and geometrical . . . isomers.”

In applying the first step of the categorical approach in this case, the panel had to examine a disjunctive list—CHSC § 11055(d)(2), which identifies several types of methamphetamine—within another disjunctive list—CHSC § 11055, which identifies several types of controlled substances. It was therefore not

enough to conclude, as the Ninth Circuit had in *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), that California's disjunctive list of controlled substances is overbroad but divisible. Rather, in this instance, another categorical analysis—addressing whether California's disjunctive list of types of methamphetamine is overbroad and, if so, divisible—was also required.

Under this approach, the panel held California's definition of methamphetamine is broader than the federal definition because California's definition includes both geometric and optical isomers of methamphetamine, while the Controlled Substance Act ("CSA") includes only optical isomers. Accordingly, California's definition of methamphetamine is not a categorical match to the federal definition under the first step of categorical approach.

Next, the panel held the overbroad element of methamphetamine in CHSC §§ 11378 and 11379(a) is also indivisible. Under California law, geometric and optical isomers of methamphetamine are alternative means of committing a single offense, not alternative elements of committing several offenses.

Because the California statute is overbroad and indivisible with respect to the overbroad element, the modified categorical approach cannot be applied to determine whether the petitioner's convictions involved a type of methamphetamine covered by the CSA. As a result, his convictions under CHSC §§ 11378 and 11379(a) do not qualify as controlled substance offenses that render him removable under INA § 237(a)(2)(B)(i).

Because the IJ and BIA did not address whether the petitioner was removable on the ground that his CHSC § 11379(a) conviction constitutes an illicit trafficking aggravated felony as defined in INA § 101(a)(43)(B), the panel did not address that question. However, the panel noted that, if the BIA addresses the government's aggravated felony theory on remand, it should consider whether that theory suffers from the same flaw as the government's theory of removability under INA § 237(a)(2)(B)(i).

Jenn Chun

Attorney Advisor

San Francisco Immigration Court, 4F

(b) (6)

From: [Hartman, Jeffrey \(EOIR\)](#)
To: [Chun, Jennifer \(EOIR\)](#)
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions
Date: Thursday, October 11, 2018 5:20:00 PM

I didn't realize it was a reply all thing. Here was my reply—seems like we're on the same page.

(b) (5)



Hope all is well!

Jeff

From: Chun, Jennifer (EOIR)
Sent: Thursday, October 11, 2018 12:49 PM
To: Deiss, Ila C. (EOIR) <Ila.Deiss@EOIR.USDOJ.GOV>
Cc: Hartman, Jeffrey (EOIR) <Jeffrey.Hartman@EOIR.USDOJ.GOV>; Globerson, Justin (EOIR) <Justin.Globerson@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

(b) (5)



From: Deiss, Ila C. (EOIR)
Sent: Thursday, October 11, 2018 11:57 AM
To: Chun, Jennifer (EOIR) <Jennifer.Chun@EOIR.USDOJ.GOV>
Cc: Hartman, Jeffrey (EOIR) <Jeffrey.Hartman@EOIR.USDOJ.GOV>; Globerson, Justin (EOIR) <Justin.Globerson@EOIR.USDOJ.GOV>
Subject: RE: Ninth Circuit published: Atenia Lorenzo v. Sessions

Hi there,

Do you know if a conviction for meth possession would render someone inadmissible under 212(a)(2)(A)(i)(II)? DHS orally moved to pretermitt adjustment of status application. ICD

Ila C. Deiss
United States Immigration Judge
100 Montgomery St., Ctrm 9
San Francisco, CA 94104

From: Chun, Jennifer (EOIR)

Sent: Wednesday, August 29, 2018 2:48 PM

To: All IJs - Ninth Circuit (EOIR) <AllIJs-NinthCircuit@EOIR.USDOJ.GOV>; All JLCs - Ninth Circuit (EOIR) <AllJLCs-NinthCircuit@EOIR.USDOJ.GOV>

Cc: Lin, Austin (EOIR) <Austin.Lin@EOIR.USDOJ.GOV>

Subject: Ninth Circuit published: *Atenia Lorenzo v. Sessions*

Atenia Lorenzo v. Sessions, No. 15-70814, --- F.3d ---, 2018 WL 4100360 (9th Cir. Aug. 29, 2018).

ISSUES: Categorical Approach, Modified Categorical Approach, Controlled Substance

HOLDINGS: If a statute contains two layers of disjunctive lists, the categorical analysis is applied to both layers of the statute. Under this approach, California’s definition of methamphetamine in California Health & Safety Code (“CHSC”) § 11055—which is an element applicable to a conviction under CHSC §§ 11378 and 11379(a)—is not a categorical match to the federal definition. As it is stated in CHSC §§ 11378 and 11379(a), the element is also indivisible, and therefore the modified categorical approach does not apply.

PRACTICAL EFFECT: A conviction of CHSC §§ 11378 or 11379(a) does not qualify as a controlled substance offense as defined in INA § 237(a)(2)(B) (i). It remains to be seen, however, if such conviction also does not qualify as an illicit trafficking offense as defined in INA § 101(a)(43)(B).

In 2013, the petitioner was convicted of violating CHSC § 11378, possessing methamphetamine, and violating CHSC § 11379(a), transporting methamphetamine. Both statutes designate methamphetamine as a controlled substance by pointing to a specific provision in CHSC § 11055, which identifies a list of Schedule II substances:

CHSC § 11378	CHSC § 11379(a)	CHSC § 11055(d)(2)
“possess[] for sale a controlled substance that . . . is specified in subdivision (d), (e), or	“transport[] . . . any controlled substance which is . . . specified in subdivision (d) or (e)	“[m]ethamphetamine, its salts, isomers, and salts of its isomers”

(f) . . . of Section 11055.”	. . . of Section 11055.”	
------------------------------	--------------------------	--

CHSC § 11033 further provides that the term “isomer,” unless otherwise defined, “includes optical and geometrical . . . isomers.”

In applying the first step of the categorical approach in this case, the panel had to examine a disjunctive list—CHSC § 11055(d)(2), which identifies several types of methamphetamine—within another disjunctive list—CHSC § 11055, which identifies several types of controlled substances. It was therefore not enough to conclude, as the Ninth Circuit had in *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), that California’s disjunctive list of controlled substances is overbroad but divisible. Rather, in this instance, another categorical analysis—addressing whether California’s disjunctive list of types of methamphetamine is overbroad and, if so, divisible—was also required.

Under this approach, the panel held California’s definition of methamphetamine is broader than the federal definition because California’s definition includes both geometric and optical isomers of methamphetamine, while the Controlled Substance Act (“CSA”) includes only optical isomers. Accordingly, California’s definition of methamphetamine is not a categorical match to the federal definition under the first step of categorical approach.

Next, the panel held the overbroad element of methamphetamine in CHSC §§ 11378 and 11379(a) is also indivisible. Under California law, geometric and optical isomers of methamphetamine are alternative means of committing a single offense, not alternative elements of committing several offenses.

Because the California statute is overbroad and indivisible with respect to the overbroad element, the modified categorical approach cannot be applied to determine whether the petitioner’s convictions involved a type of methamphetamine covered by the CSA. As a result, his convictions under CHSC §§ 11378 and 11379(a) do not qualify as controlled substance offenses that render him removable under INA § 237(a)(2)(B)(i).

Because the IJ and BIA did not address whether the petitioner was removable on the ground that his CHSC § 11379(a) conviction constitutes an illicit trafficking aggravated felony as defined in INA § 101(a)(43)(B), the panel did

not address that question. However, the panel noted that, if the BIA addresses the government's aggravated felony theory on remand, it should consider whether that theory suffers from the same flaw as the government's theory of removability under INA § 237(a)(2)(B)(i).

Jenn Chun

Attorney Advisor

San Francisco Immigration Court, 4F

(b) (6)